88-1022

No._____

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGERMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In September, 1985, pursuant to 34 C.F.R. §300.504(a), Henrico County Public Schools (Henrico) notified the parents of Jonathan Spielberg that it was proposing a change in Jonathan's placement. The notice specifically stated that the decision on placement would be made after consideration of revisions to Jonathan's individualized education program (IEP). Jonathan's IEP was subsequently revised in two meetings with Jonathan's parents and their attorney, and the IEP Committee then agreed that Jonathan could be moved from a Pennsylvania institution to a "state of the art" Henrico public day school.

Condemning what it called a lack of parental involvement in the placement decision, the Fourth Circuit ruled that Henrico officials denied Jonathan a free appropriate public education (FAPE) under

the Education of All Handicapped Children Act (EAHCA) "when they resolved to educate Jonathan Spielberg at Randolph, and then developed an IEP to carry out their decision." App. 14.

Upon finding the violation, the Fourth Circuit ordered continuation of the Pennsylvania placement. However, it did not consider the extensive parental involvement throughout the decisional process or the final state administrative decision which found the Pennsylvania program overly restrictive for Jonathan.

The questions presented are two:

I. **Is the proper standard of review for EAHCA procedural compliance Rowley's "adequate compliance" standard or the Fourth Circuit's "zero tolerance" test?**

II. **When the Fourth Circuit relied upon what it believed school officials "resolved" before the IEP meeting, did its use of a "mental processes" test misapply the procedural safeguards of EAHCA, as interpreted in Rowley?**

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October Term, 1988

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HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGARMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG, and SUSAN SPIELBERG,

Plaintiffs/Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

OPINIONS BELOW

The Court of Appeals opinion is reported at 853 F.2d 256 (4th Cir. 1988). It is reproduced at App. pp. 1-14. The

order denying Henrico's petition for rehearing is reproduced at App. pp. 15-16. The two district court opinions are unreported. Case No. 86-0304-R (E.D. Va. January 23, 1987 and October 8, 1987). They are reproduced at App. pp. 17-59. The state administrative decisions are unreported and were issued on March 5, 1986 and April 26, 1986. They are reproduced at App. pp. 60-155.

JURISDICTION

The Court of Appeals decision was entered on August 5, 1988. Rehearing was denied on September 22, 1988. This Petition is timely filed. Jurisdiction is invoked under 28 U.S.C. §2101(c).

REGULATORY PROVISIONS INVOLVED

Title 20 of the United States Code, in relevant part, provides:

§1415(b)(1) The procedures required by this section shall include, but shall not be limited to:

. . .

(c) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

. . .

(e)(2) ... In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Title 34 of the Code of Federal Regulations, in relevant part, provides:

§ 300.104 (a) Preplacement evaluation. A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of

handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

§ 300.342 (b) An individualized education program must:
(1) Be in effect before special education and related services are provided to a child; and
(2) Be implemented as soon as possible following the meetings under Reg. 300.343.

§ 300.344 (b) Evaluation personnel. For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

§ 300.347 (a) (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility,

the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with Reg. 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting....

§ 300.504 (a) Notice. Written notice which meets the requirements under Reg. 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child.

§ 300.505 (a) The notice under Reg. 300.504 must include: (1) A full explanation of all the procedural safeguards available to the parents under Subpart E; (2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected; (3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the

proposal or refusal; and (4) A description of any other factors which are relevant to the agency's proposal or refusal.

§ 300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special educational program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of Reg. 300.532.

§300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the

evaluation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with Regs. 300.340-300.349 of Subpart C.

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data in making placement decisions....

§ 300.552 Each public agency shall insure that:

(a) Each handicapped child's educational placement:

. . .

(2) Is based on his or her individualized education program....

In addition, Appendix C to 34 C.F.R., Part 300, in relevant part, provides:

> **8. Must the agency hold a separate meeting to determine a child's eligibility for special education and related services, or can this step be combined with the IEP meeting?**
>
> .... The decisions regarding (1) whether the team members actually meet together and (2) whether such meetings are separate from the IEP meeting, are matters that are left to the discretion of State or local agencies....
>
> NOTE: When separate meetings are conducted, placement decisions would be made at the IEP meeting. However, placement options could be discussed at the eligibility meeting.
>
> **23. Must related services personnel attend IEP meetings?**
>
> No. It is not required that they attend. However, if a handicapped child has an identified need for related services, it would be appropriate for the related services personnel to attend the meeting or otherwise be involved in developing the IEP. For example, when the child's evaluation indicates the need for a specific related service (e.g., physical therapy, occupational therapy, or

counseling), the agency should ensure that a qualified provider of that service either (1) attends the IEP meeting, or (2) provides a written recommendation concerning the nature, frequency, and amount of service to be provided to the child.

32. **Must parents be informed at the IEP meeting of their right to appeal?**

If the agency has already informed the parents of their right to appeal, as it is required to do under the prior notice provisions of the regulations (§§300.504-300.505), it would not be necessary for the agency to do so again at the IEP meeting....

42. **When must IEP objectives be written - before placement or after placement?**

IEP objectives must be written before placement. Once a handicapped child is placed in a special education program, the teacher might develop lesson plans or more detailed objectives based on the IEP; however, such plans and objectives are not required to be a part of the IEP itself.

43. **Can short term instructional objectives be changed without initiating another IEP meeting?**

No. Section 300.343(a) provides that the agency "is responsible for initiating and

conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program" (emphasis added). Since a change in short term instructional objectives constitutes a revision of the child's IEP, the agency must (1) notify the parents of the proposed change (see §300.504(a)(1)), and (2) initiate an IEP meeting.

55. Is it permissible for an agency to have the IEP completed when the IEP meeting begins?

No. It is not permissible for an agency to present a completed IEP to parents for their approval before there has been a full discussion with the parents of (1) the child's need for special education and related services, and (2) what services the agency will provide to the child.... It would be appropriate for agency staff to come prepared with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided. However, the agency must make it clear to the parents at the outset of the meeting that the services proposed by the agency are only recommendations for review and discussion with the parents. The legislative history of Pub. L. 94-142 makes it clear that parents

must be given the opportunity to be active participants in all major decisions affecting the education of their handicapped children....

59. If placement decisions are made at the time the IEP is developed, how can a private school representative attend the meeting?

Generally, a child who requires placement in either a public or private residential school has already been receiving special education, and the parents and school personnel have often jointly been involved over a prolonged period of time in attempting to find the most appropriate placement for the child. At some point in this process (e.g., at a meeting where the child's current IEP is being reviewed), the possibility of residential school placement might be proposed--by either the parents or school personnel. If both agree, then the matter would be explored with the residential school. A subsequent meeting would then be conducted to finalize the IEP. At this meeting, the public agency must ensure that a representative of the residential school either (1) attends the meeting or (2) participates through individual or conference telephone calls, or by other means.

Section II (B)(1)(g) of the Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia provides, in relevant part:

> Each LEA shall insure that an evaluation of the child, based on required procedures, is conducted:
>
> ...
>
> (3) Anytime a significant change in placement is being considered.

Page 18 of the Virginia Department of Education's interpretation of state special education regulations, The Process for Special Education Determination in Virginia (Clarification of Issues) (Screening, Assessment/ Eligibility, IEP Development/ Implementation), provides, in relevant part, as follows:

> **•Under what circumstances can existing date be considered "current"?**

> Generally, assessment data less than 6 months old may be considered current and thus presented to the committee(s) for review and consideration in decision making. Information older than 6 months must be updated by an appropriate professional.

STATEMENT OF THE CASE

This special education case involves the Fourth Circuit's reversal of two state administrative decisions and a federal district court decision in favor of Henrico County Public Schools on the issue of procedural compliance with the Education of All Handicapped Children Act.

Jonathan Spielberg is a brain-damaged, severely retarded 19 year old. Diagnosed as profoundly retarded at age 2, Jonathan lived at home with his parents until he was 5 years old.

Since Henrico did not have an educational program which served severely

retarded children at the time, Jonathan was placed in the Melmark School ("Melmark") in Pennsylvania in October, 1977. The School Board has paid the full cost of the Melmark placement since that time.

In March, 1985, nine months after Jonathan's triennial reevaluation, Henrico notified the Spielbergs in writing that it would reevaluate Jonathan and the appropriateness of his placement. A School Board team conducted an on-site evaluation in August, 1985 and expressed its opinion that Jonathan could be appropriately served in his home community. The written evaluation reports were shared with the parents as soon as they were completed, and on two occasions Henrico agreed to pay the costs of outside evaluations if the Spielbergs wished to obtain and submit them.

On the basis of its evaluations, Henrico gave written notice that it was proposing a change in placement following revision of Jonathan's IEP in October, 1985. Meetings to develop a revised IEP and to consider a change in placement were held in October and November, 1985, and the parents and their attorney were present and participated. At the end of the meeting, the IEP Committee members agreed that Jonathan could be served in the day program of Virginia Randolph in Henrico.

Neither the School Board nor any school administrators ever adopted any "resolution" regarding Jonathan's placement during this process even though the Fourth Circuit used the word "resolved" in its procedural violation ruling. App. 14. Nor was any document created by Henrico before the IEP

meetings which indicated that Virginia Randolph would be, as opposed to "could be," Jonathan's placement.

The Spielbergs and Henrico were unable to agree on a change in Jonathan's placement after the IEP meeting, and Henrico requested a due process hearing. In the hearing, the Spielbergs claimed a predetermination of placement. Both the local and the state hearing officers held that Henrico had not violated the parents' procedural rights, and the final state decision found that Henrico's proposed day school program was "state of the art" and offered Jonathan FAPE.

The parents appealed to federal district court. Jurisdiction was based upon 20 U.S.C. §1415(e) and 28 U.S.C. §1331. Following a brief trial, the district court initially ruled that Henrico had violated the parents'

procedural rights when it "determined" to change Jonathan's placement prior to development of a new IEP. App. 55 (emphasis added).

The trial court grounded its conclusion upon a September 13, 1985 letter sent before the IEP meeting with the Spielbergs. In that letter, Henrico notified the parents of its proposal to change Jonathan's placement after revisions in Jonathan's IEP were considered in an IEP meeting. The district court found that although the notice expressly stated that a placement decision would be made <u>after</u> revision of Jonathan's IEP, "the clear import of the letter is that the decision to place Jonathan in the day program at Virginia Randolph had been made." App. 55. This, the court said, violated its view that "a placement decision can only be made after

the development of an IEP and in accordance therewith." App. 55 (citation omitted). In a footnote, the court explained this finding by its analysis that the EAHCA regulatory scheme calls for "a notice and a 'placement' meeting after the I.E.P. is developed and before a change in placement is made." App. 59.

Some nine months later, the district court vacated its earlier ruling and found for Henrico on the issue of procedural compliance. It ruled that 34 C.F.R. §300.552 "is not a procedural requirement that the placement decision follow the development of the IEP." App. 41. It based its conclusion on the fact that 34 C.F.R. §300.347 and the Fourth Circuit's unpublished decision in Patterson C. v. Board of Education of Prince George's County, Maryland, No. 86-2638 (4th Cir. May 7, 1987), indicates

that consideration of placement changes may precede IEP development. However, the district court did not readdress its previous finding "that the defendants had resolved to place Jonathan at Virginia Randolph prior to the I.E.P. meeting" because there was no need to do so given its conclusion that the School Board was procedurally correct as a matter of law. App. 35 (emphasis added).

When Henrico challenged another portion of the district court's decision in the Fourth Circuit, the Spielbergs cross-appealed the adverse procedural compliance ruling. In the appeals court, Henrico defended the district court's procedural compliance result, and Henrico buttressed its defense with an attack on the district court's unmodified finding of fact as being predicated upon an erroneous view of the law as well as

being clearly erroneous under F.R.C.P. 52(a).

Nevertheless, the Court of Appeals expressly relied upon the district court's finding of fact in ruling against Henrico, but it never acknowledged or addressed Henrico's two assignments of error to that finding.[1]

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[1] Henrico understands that, under the pressure of burgeoning caseloads, a detailed appellate court discourse on every point raised is neither possible nor desirable. Nonetheless, given the contrary result in the trial court and the two administrative hearings, and given the conflict with Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987) (no procedural violation even though placement decision made and IEP drafted before IEP meeting), and Jackson v. Franklin County School Board, 806 F.2d 623 (5th Cir. 1986) (school officials violated EAHCA because they did not send a prior written notice proposing a change in placement and then convene an IEP meeting to discuss a placement change), more than a superficial statement of an appellate conclusion was justified in this case. Henrico

The court held that although there was a "series of letters and meetings between school officials and the Spielbergs" and even though "a new IEP" had been prepared with parental participation, Henrico violated the "spirit and intent of the EHA which emphasizes parental involvement." App. 5, 13. The court reasoned that 34 C.F.R. §300.552(a)(2) requires preparation of an IEP before a placement decision is made. App. 11-12. Therefore, in the court's view, "when they resolved to educate Jonathan Spielberg at Randolph, and then developed an IEP to carry out their decision," Henrico officials relegated the parents to "[a]fter the fact involvement." App.

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[1] (cont'd.) does not believe there was meaningful appellate review because the Fourth Circuit did not even consider Henrico's vigorous challenges to the contested finding of fact.

14, 13 (emphasis added).

However, contrary to its "IEP before placement" reading of 34 C.F.R. §300.552, the Fourth Circuit panel acknowledged that "in some instances, the placement decision can precede IEP development." App. 13. It noted that 34 C.F.R. §300.347 requires private school officials to participate in IEP development, and it claimed that §300.347 created a private school "exception" to the "general rule." App. 14. The court conceded that "34 C.F.R. §300.347 calls for the private school which a child will attend to participate in IEP development," and it suggested that this section allows school officials to "predetermine placement" if a child is to be placed in a private school but not a public school. App. 13-14.

Unfortunately, the Court of Appeals never indicated how, if an IEP

meeting is to secure parental involvement before any placement consideration is undertaken, school officials could decide to invite private school officials to come to the IEP meeting without the effect of predetermining placement into the private school.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's "Zero Tolerance" Test For Assessing EAHCA Procedural Compliance Destroys The Balancing Of Rowley's "Adequate Compliance" Standard And Distorts Judicial Assessment Of Alleged Procedural Violations And The Fashioning Of Appropriate Relief.

A. The "Zero Tolerance" Test, Which Ignores Underlying Circumstances, Curative Factors, Or The Duration And Relative Significance Of An Alleged Violation, Erroneously Disregards The Competing Interests In EAHCA Procedural Compliance Cases.

In rejecting parental contentions that "maximization" of a child's potential is mandated by EAHCA, this Court's Rowley opinion grounded its decision on the "legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." Board of Education of Hendrick Hudson Central School District

v. Rowley, 458 U.S. 176, 206 (1982) (emphasis added). By formulating a reasonableness standard for review of EAHCA's "elaborate and highly specific" procedures, Rowley deliberately balanced parental desires for hypertechnicality against the natural tendency of school officials to focus upon service delivery. Id. at 205.

In a very real sense, this case is the procedural compliance analogue of Rowley's "maximization" v. "access" debate about EAHCA substantive compliance. As such, it calls for the same balanced response from the Court.

In Spielberg, the Fourth Circuit disregarded Rowley's "adequate compliance" standard. By applying reasoning developed under entirely different facts and circumstances, the Fourth Circuit created a "zero tolerance"

test which ignores context, mitigating events, duration, or the relative significance of alleged violations.

The precedent cited in Spielberg is Hall v. Vance County Board of Education, 774 F.2d 629, 634-5 (4th Cir. 1985), a decision which addressed a North Carolina school district's "consistent failure to comply with the Act's requirements" with respect to parental notice and development of an IEP. To remedy prolonged and fundamental procedural violations, the Fourth Circuit announced that "[u]nder Rowley, these failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that the school failed to provide a FAPE before January, 1982." Id. at 635 (emphasis added).

Given the aggravated nature of Vance County's failures in James Hall's case,

Hall was a logical application of Rowley's "adequate compliance" test. However, Hall's emphasis upon the violation of "fundamental procedures" over an extended period of time reasonably suggested that relatively minor infractions or merely technical violations which were mitigated or offset by other circumstances would not be viewed as a denial of FAPE. Id. at 635. See also Hudson, 828 F.2d at 1063 ("serious procedural noncompliance can by itself support a finding that the child has not been provided with a FAPE") (citing Hall).

Spielberg totally ignored that implication. This case has transformed Hall from a tool to correct prolonged breaches of basic EAHCA procedures into a "zero tolerance" test which finds there is a denial of FAPE whenever any

procedural violation is found, no matter how harmless or insignificant.

Stripped to its ultimate conclusion, the Fourth Circuit panel decided that because Henrico sent the 34 C.F.R. §300.504(a) notice of a proposed change in placement before, rather than after, an IEP meeting with the Spielbergs, "[t]his failure to follow EHA procedures is sufficient to hold that the defendants failed to provide Jonathan with a FAPE." App. 14 (citing Hall).

This result is wrong for two basic reasons. First, Henrico's actions did not constitute a violation of EAHCA procedures. Under the United States Department of Education (hereinafter "Department") interpretation of the federal special education regulations, school officials may consider placement options prior to the IEP meeting. 34

C.F.R. Part 300, Appendix C, Question 8 at 77 (1987) ("placement options could be discussed at the eligibility meeting"); Question 55 at 87 (agency staff may come to IEP meeting with a "recommendation regarding ... the kind of special education and related services to be provided"); Question 59 at 88 (possibility of residential school placement "might be proposed" by school officials "[a]t some point in this process"). See also 34 C.F.R. §104.35(a) (evaluation must be conducted before "any subsequent significant change in placement").

In addition, school officials may, and arguably must, make placement proposals prior to an IEP meeting. Compare 34 C.F.R. §300.504(a) (parents must be given prior written notice of proposals to change placement) with

Question 8 at 77 (placement decisions would be made at the IEP meeting) and Question 32 at 81 (§300.504 notice is required prior to IEP meeting).

Furthermore, in 1980 the Department issued a ruling contrary to the Fourth Circuit's 1988 view that 34 C.F.R. §300.552 prohibits placement decisions prior to IEP meetings.[2] Compare App. 12-13 with U. S. Dept. of Educ., Office of Special Education Programs, Policy Letter (January 23, 1980), Ed. of Handicapped L. Rep. 211:153 (1980) (Maryland by-law which requires placement decision before

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[2] The Fourth Circuit cited Question 42 for the proposition that the IEP "must be written before placement." App. 12. However, 34 C.F.R. §300.342(a) makes it clear that Question 42 simply means that an IEP must be in place "before special education and related services are provided to a child." (emphasis added)

IEP development is not violative of EAHCA).[3]

In fact, if the panel is correct that "[e]ducational placement is based on the IEP," it is impossible to understand why neither 34 C.F.R. §300.505(a)(2) dealing with the content of notices proposing placement changes nor 34 C.F.R. §300.533(a) dealing with the information

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[3] Not only did the Department's January 23, 1980 ruling approve a Maryland by-law which "specifies that the IEP shall be written after the placement decision," the Fourth Circuit actually enforced the same by-law in Patterson C. v. School Board of Prince George's County, Maryland, Case No. 86-2638 (4th Cir. May 7, 1987) (per curiam). The panel's creation of a private school "exception" to reconcile Spielberg with the Department's ruling, Patterson C., and the requirements of 34 C.F.R. § 300.347(a) is flatly prohibited by the applicability of 34 C.F.R. §300.552(a) to "[e]ach handicapped child's educational placement." (emphasis added). Cf. Honig v. Doe, ____ U.S. ____, 108 S.Ct. 592, 605 n.8 (the language of the Act "means what it says").

to be used in making placement decisions even mentions the IEP as the basis for placement decisions. App. 8.

Second, even if Henrico's actions before the IEP meeting did violate EAHCA procedures, the breach did not rise to the level of a denial of FAPE in light of the extensive involvement of the Spielbergs in the IEP development process. As the state review officer found, "[a]lthough there may have been technical violations...such were not significant and prejudicial violations of procedure that seriously compromised the provision of a free appropriate education to Jonathan Spielberg." App. 84.

The evidence is undisputed that (1) Henrico advised the parents in March, 1985 of Henrico's reevaluation plans, (2) in April and September, 1985, Henrico invited the Spielbergs to obtain and

submit outside evaluations at Henrico's expense, (3) in September, 1985, Henrico provided written copies of all of its evaluation reports well in advance of the IEP meetings, (4) also in September, 1985 Henrico gave notice of its placement proposal prior to the IEP meetings to enable the Spielbergs to bring knowledgeable persons with opinions on the proposal, and (5) in October and November, 1985 the Spielbergs and their attorney were active participants in two IEP meetings held to revise Jonathan's IEP. The Fourth Circuit's failure to consider these circumstances led it to conclude that the parents were relegated to "after the fact involvement" which

denied Jonathan FAPE.[4] App. 13.

Henrico submits that Rowley's "adequate compliance" test is the proper standard for EAHCA procedural claims because it serves the best interests of both school districts and handicapped children.

While school officials should be held responsible for fundamental or

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4 The panel's conclusion on this point is also puzzling in light of the Fourth Circuit's previous decision in Hudson, supra. Hudson correctly found that school officials complied with EAHCA even though they had admittedly made a placement decision and drafted an IEP before their IEP meeting with the parents. 828 F.2d at 1062. The Hudson panel accepted the district court's view that the extensive parental involvement in a subsequent IEP meeting satisfied EAHCA requirements. Given the differing outcomes in Spielberg and Hudson, is EAHCA compliance in the Fourth Circuit simply to be a matter of the "luck of the draw" in appellate panels or has Spielberg's "zero tolerance" test superceded Hudson?

prolonged breakdowns in EAHCA compliance, they should not be hamstrung by judicial hypertechnicality which unduly diverts attention from the task of educating their handicapped students. Similarly, handicapped children will benefit most from a special education process which reduces excessive concern about paperwork and procedural compliance in favor of the delivery of individualized programming.

It would be an irony, indeed, if Rowley's emphasis upon the availability of special education to previously unserved children becomes submerged in quibbling about exact procedural compliance. The competing interests demand that the EAHCA procedural compliance standard be a balanced one.

B. The Fourth Circuit's "Zero Tolerance" Test Violates The Court's EAHCA Obligation To Grant "Appropriate Relief" Since A Finding Of Procedural Error Automatically Entitles Parents To The Program They Seek Without Judicial Review As To Its Appropriateness For The Child.

20 U.S.C. §1415(e)(2) directs courts reviewing state administrative decisions to "grant such relief as the court determines is appropriate." However, application of the "zero tolerance" standard in the Fourth Circuit creates the anomalous result that handicapped students will be educated in inappropriate programs if school officials exercise correct judgment in their programming decisions but

incorrectly comply with the Act's procedures.

When the district court initially found Henrico had violated the Spielbergs' procedural rights, and when the Fourth Circuit subsequently reached the same conclusion, both courts ordered Henrico to maintain Jonathan in his current placement. App. 57, 14. However, neither court's decision even considered whether Jonathan's current placement is proper. Indeed, the Fourth Circuit continued Jonathan's current placement even though it expressly found that the district court was wrong in determining that Jonathan's Pennsylvania placement is appropriate. App. 11 n.2.

Judicial failure to consider the child's substantive needs in the event of procedural error runs counter to Congressional intent since the "zero

tolerance" test automatically reverses local educational programming judgments. As this Court has said, "courts must be careful to avoid imposing their view of preferable educational methods upon the States." Rowley, 458 U.S. at 207 (footnote omitted). "[I]t seems highly unlikely that Congress intended courts to overturn a state's choice of appropriate educational theories in a proceeding conducted pursuant to §1415(e)(2)." Id. at 207-08 (footnote omitted).

Henrico's IEP Committee and the final state adminstrative decision concluded that Jonathan's Pennsylvania placement is overly restrictive. App. 81-83. Rather than receive available educational services in his home community, Jonathan is in an institution 250 miles from home. Even if Henrico violated his parents' procedural rights,

Jonathan's placement should still be changed. Jonathan needs the opportunity to receive transitional educational services in his home community before his entitlement to services ends at age 22.

By applying "zero tolerance" to find procedural noncompliance and automatically continuing Jonathan's placement, both the district court and the Fourth Circuit denied Jonathan the "appropriate relief" required by 20 U.S.C. §1415(e)(2). Their failures to conduct a proper review of the evidence and to give "due weight" to the placement decision of the state review officer deprives Jonathan of the ultimate objective of the Act: appropriate educational services. Rowley, 458 U.S. at 206.

Thus, "zero tolerance" is wrong in both its procedural operation and its

substantive outcome. Even if school officials are mistaken in their compliance with EAHCA safeguards, their procedural errors do not invalidate their substantive educational judgments or automatically make parents correct about the placement needs of their children. Cf. Rowley, 458 U.S. at 208 ("Entrusting a child's education to state and local agencies" is in keeping with the "primacy of States in the field of education," given the "'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.'") (citation omitted)

As a matter of law, any court's automatic acceptance of the parents' preferred placement in the event of a school's procedural error leaves a handicapped child without judicial protection in violation of 20 U.S.C.

§1415(e)(2). In order to grant "appropriate relief" as required by the Act, courts must make independent determinations of the appropriateness of a child's program, even in the case of egregious procedural errors by school officials. The Fourth Circuit's failure to make such a determination in Jonathan's case justifies the intervention of this Court.

II. The "Mental Processes" Test Applied By The Fourth Circuit Is An Unprecedented Departure From This Court's Seminal Analysis Of EAHCA Procedural Protections In Rowley And Its Recent Decision In Honig.

A. Application Of An "Intent" Test To EAHCA Procedural Compliance Undercuts The Act's Requirement of Knowledgeable Decision-Making By School Officials.

Other than in this Fourth Circuit decision, no appellate court in the country has ever examined the "intent" or "mental processes" of school officials in measuring compliance with the procedural protections of EAHCA. Unlike Title VII or antritrust cases where "state of mind" is an essential element of inquiry, the correct test in EAHCA cases is simply "has the State complied with the procedures set forth in the Act?" Rowley, 458 U.S. at 206 (footnote omitted).

The Fourth Circuit apparently believes that school officials may not

have any knowledge or opinions about a handicapped child prior to an IEP meeting without rendering parental involvement in the IEP process "[a]fter the fact." App. 13. However, federal regulations expressly require school officials to be knowledgeable in advance of IEP meetings. See, e.g., 34 C.F.R. §300.531 (pre-IEP evaluation is to provide a "full and individual" review of "the child's educational needs"); 34 C.F.R. § 300.344(b)(2) (public agency must have a representative present at the IEP meeting who "is familiar with the results of the evaluation").

Even more important, school officials may design proposals in advance of IEP meetings as long as it is clear that parents are entitled to participate in the decision process. 34 C.F.R. Part 300, Appendix C, Question 55 at 87 (1987)

(agency school staff members may come to IEP meeting "with evaluation findings, statements of present levels of educational performance, and a recommendation regarding annual goals, short term instructional objectives, and the kind of special education and related services to be provided").

The Fourth Circuit's suggestion that parental involvement is compromised by the efforts of school officials to insure informed decision-making also ignores the Act's assignment of "primary responsibility for formulating the education to be accorded a handicapped child" to "state and local educational agencies in cooperation with the parents or guardian of the child." Rowley, 458 U.S. at 207.

Not only may school officials think about a child's needs in advance of an

IEP meeting, the statutory scheme virtually mandates that they must. Indeed, the Fourth Circuit's position seems to be that professional educators should avoid any consideration of a student's program between IEP meetings or triennial reevaluations, no matter how circumstances change. Henrico contends that as long as parents have input into the educational decisions about their handicapped child, the purpose of the Act's procedures is met.

B. **The Fourth Circuit's Inquiry Into School Officials' "Intent" To Change A Handicapped Child's Educational Placement Prior To An IEP Meeting Will Leave Educators "Hamstrung" Contrary To This Court's Desire In Honig v. Doe.**

The pernicious effects of the Fourth Circuit's reliance upon speculation about what Henrico officials "resolved" go far beyond one child in one Pennsylvania institution. If the "motivation" of school officials becomes a relevant avenue of inquiry in EAHCA procedural compliance cases, special education litigation will expand exponentially.

One area where this case is likely to have immediate impact is the discipline of handicapped students, particularly those who are continually disruptive or truly dangerous to the safety of others.

In Honig, the Court stated that students posing immediate threats to the safety of others may be suspended for up to 10 days. 108 S.Ct. at 605.

> ...[this period] provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the parents to agree to an interim placement.

Id. (emphasis added). Under this formula, which Justice Brennan suggested would "not leave educators hamstrung," school officials would (1) suspend the student for the dangerous or seriously disruptive behavior, (2) schedule an IEP meeting with the parents, and (3) try, presumably in the IEP meeting, to convince the parents that a different program is necessary. 108 S.Ct. at 605.

Honig's formula will not work if Spielberg stands. Under the Fourth Circuit's "mental processes" test, school officials may not even consider whether there is any need to convene an IEP meeting without being in jeopardy of "intending" whatever IEP or placement change results from the IEP meeting.

And, even though Honig envisions the discussion of an "interim placement" during the IEP meeting, Spielberg would condemn the pre-meeting process by which educators explore alternatives and decide which interim placement to recommend to parents in the IEP meeting. Id.

The true danger of the Fourth Circuit's "mental processes" standard is that every action taken by school officials is now subject to attack as "after the fact" of their actual "decision." App. 13. No matter what educators do, every action will be claimed by parents to be illegally "predetermined."

CONCLUSION

A writ of certiorari, or an order summarily reversing the Fourth Circuit's decision on the procedural violation

issue, should be granted by this Court. In addition, in view of both lower courts' failure to properly address Jonathan's substantive placement needs, the final state adminstrative decision in favor of Henrico's proposed program should be reinstated.

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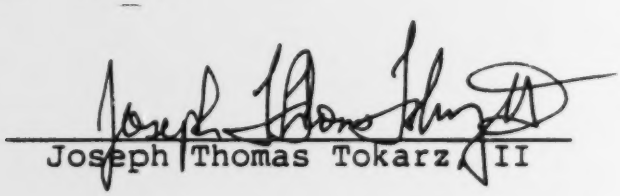
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 1988, a true and accurate copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit and the separately bound Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit has been hand-delivered to the offices of: Thomas Franklin Guernsey, Esq., Associate Professor of Law, Youth Advocacy Clinic, University of Richmond, Richmond, Virginia 23173 and Kathleen S. Mehfoud, Esq., 411 E. Franklin Street, Suite 602, Richmond, Virginia 23219.



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